

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

IN RE:

CLINTON PORTIS,

Debtor.

CASE NO.: 15-10274-KKS
CHAPTER: 7

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**ORDER GRANTING DEBTOR'S AMENDED MOTION TO
REOPEN CASE TO FILE AMENDED SCHEDULES TO INCLUDE
OMITTED ASSET (DOC. 137), AS MODIFIED BY NOTICE OF
PARTIAL WITHDRAWAL REGARDING DEBTOR'S AMENDED
MOTION TO REOPEN CASE TO FILE AMENDED SCHEDULES
TO INCLUDE OMITTED ASSET (DOC. 143)**

THIS MATTER is before the Court on *Debtor's Amended Motion to Reopen Case to file Amended Schedules to Include Omitted Asset* ("Amended Motion to Reopen," Doc. 137), as modified by *Notice of Partial Withdrawal Regarding Debtor's Amended Motion to Reopen Case to File Amended Schedules to Include Omitted Asset* ("Partial Withdrawal," Doc. 143).¹ The Bank of New York Mellon fka The Bank of New York As Trustee for the Certificate Holders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass-Through Certificates, Series

¹ Former Debtor also filed a *Memorandum of Law in Support of Debtor's Amended Motion to Reopen Case to File Amended Schedules to Include Omitted Asset*, Doc. 138.

2007-19 (“BONY”), objects.² After two hearings at which the Court heard argument of counsel for former Debtor and BONY, and after careful consideration, for the reasons that follow the Amended Motion to Reopen, as modified by the Partial Withdrawal, is due to be granted.

BACKGROUND

On May 5, 2014, BONY filed a foreclosure action in state court against former Debtor and his mother (“2014 Foreclosure Action”) seeking to foreclose on real property in Alachua County, Florida.³ On October 6, 2014, former Debtor and his mother moved to dismiss the 2014 Foreclosure Action on the basis that the signatures on the mortgage documents were not theirs.⁴ The state court Magistrate Judge denied

² *Objection to Debtor’s Amended Motion to Reopen Case to File Amended Schedules to Include Omitted Asset*, Doc. 140; *Response to Notice of Partial Withdrawal Regarding Debtor’s Amended Motion to Reopen Case to File Amended Schedules to Include Omitted Asset*, Doc. 147. Former Debtor filed *Debtor’s Response in Opposition to Creditor’s Objection to Debtor’s Amended Motion to Reopen Case to File Amended Schedules to Include Omitted Asset*, Doc. 141.

³ *Verified Complaint to Foreclose Mortgage, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass Through Certificates, Series 2007-19 v. Hearn*, No.: 01-2014-CA-1598 (Fla. 8th Cir. Ct. May 5, 2014), Filing # 13246561. The Court takes judicial notice of the dockets and papers in the 2014 and 2019 Foreclosure Actions filed by BONY or its predecessor. Fed. R. Evid. 201; *Bryant v. Ford*, 967 F.3d 1272, 1275 (11th Cir. 2020) (quoting Fed. R. Evid. 201(b)) (“Rule 201 of the Federal Rules of Evidence permits a court to ‘judicially notice a fact that is not subject to reasonable dispute because it either ‘is generally known within the trial court’s territorial jurisdiction’ or ‘can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’”).

⁴ *Motion to Dismiss, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass Through Certificates, Series 2007-19 v. Hearn*, No.: 01-2014-CA-1598 (Fla. 8th Cir. Ct. Oct. 5, 2014), Filing # 19013324.

their motion to dismiss.⁵ On January 26, 2015, former Debtor and his mother filed an answer asserting two affirmative defenses: the signatures on the note and mortgage were not theirs, and the promissory note was not authentic.⁶

Former Debtor filed a voluntary Chapter 11 petition commencing this case on November 5, 2015; he filed the remainder of his Schedules and required documents on December 16, 2015.⁷ Former Debtor listed the property on which BONY sought to foreclose on his Schedule A; he did not list the property as exempt on his Schedule C.⁸ On his Schedule D, former Debtor listed the mortgage to BONY but did not mark it as disputed, contingent, or unliquidated.⁹ Former Debtor listed two lawsuits on his Statement of Financial Affairs, but not the 2014 Foreclosure Action, despite the requirement to “[l]ist all suits and administrative proceedings

⁵ *Report and Recommendation of General Magistrate, Order Denying Motion to Dismiss, Directing Answer, and Setting Case Management Conference, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass Through Certificates, Series 2007-19 v. Hearn*, No.: 01-2014-CA-1598 (Fla. 8th Cir. Ct. Feb. 3, 2015), Filing # 00040450372.

⁶ *Answer, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass Through Certificates, Series 2007-19 v. Hearn*, No.: 01-2014-CA-1598 (Fla. 8th Cir. Ct. Jan. 26, 2015), Filing # 22991096.

⁷ *Voluntary Petition*, Doc. 1; Doc. 27.

⁸ Doc. 27, pp. 6, 10.

⁹ *Id.* at p. 11.

to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case.”¹⁰

The Assistant United States Trustee held and concluded the Chapter 11 § 341 meeting of creditors on December 21, 2015.¹¹ Former Debtor later filed a motion to convert his case to Chapter 7 which the Court granted on February 22, 2016.¹² Former Debtor received his Chapter 7 discharge on July 26, 2016.¹³ After several continuances the Chapter 7 Trustee concluded the Chapter 7 § 341 meeting of creditors on April 7, 2017; she filed a report of no distribution the same day.¹⁴ The Court closed former Debtor’s bankruptcy case on June 7, 2018.¹⁵

At no time during former Debtor’s bankruptcy case did BONY seek stay relief to continue the 2014 Foreclosure Action, which the state court closed on November 19, 2015 after BONY filed a suggestion of bankruptcy.¹⁶

¹⁰ *Id.* at p. 28 (emphasis in original).

¹¹ Doc. 32.

¹² *Motion to Convert Case to Chapter 7*, Doc. 55; *Order Converting Case to Chapter 7*, Doc. 60.

¹³ *Order of Discharge*, Doc. 108.

¹⁴ Docs. 111 & 112.

¹⁵ Doc. 115.

¹⁶ *Suggestion of Bankruptcy, The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass Through Certificates, Series 2007-19 v. Hearn*, No.: 01-2014-CA-1598 (Fla. 8th Cir. Ct. Nov. 19, 2015), Filing #34682973.

More than a year after the Court closed this case, on September 17, 2019, BONY filed a second foreclosure action against former Debtor and his mother, seeking to foreclose on the same property in Alachua County, Florida (“2019 Foreclosure Action”).¹⁷ In response, former Debtor and his mother filed an answer, affirmative defenses and counterclaim in which they raised some of the same defenses they had in the 2014 Foreclosure Action. Among other things, they defensively allege that the BONY mortgage documents were forged and that BONY is estopped from enforcing them.¹⁸ Their counterclaim seeks damages against BONY for aiding and abetting fraud.¹⁹ BONY moved to strike the affirmative defenses and dismiss the counterclaims on the basis of judicial estoppel.²⁰ Former Debtor filed a response in objection.²¹

¹⁷ *Verified Complaint for Foreclosure, The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass-Through Certificates Series 2007-19 v. Portis*, No.: 01-2019-CA-3183 (Fla. 8th Cir. Ct. Sept. 17, 2019), Filing # 95830832.

¹⁸ *Defendants’, Clinton E. Portis and Rhonnel Y. Hearn, Answer, Affirmative Defenses, Counterclaim and Cross-Claim, The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass-Through Certificates Series 2007-19 v. Portis*, No.: 01-2019-CA-3183 (Fla. 8th Cir. Ct. May 1, 2020), Filing # 106977497. Although the title to this pleading includes “Cross-Claim,” no crossclaim appears in the body.

¹⁹ *Id.*

²⁰ *Plaintiff’s Amended Motion to Strike Affirmative Defenses and to Dismiss Counterclaims, The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of CWMBBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass-Through Certificates Series 2007-19 v. Portis*, No.: 01-2019-CA-3183 (Fla. 8th Cir. Ct. June 26, 2020), Filing # 109434300.

²¹ *Counter-Plaintiffs’, Clinton E. Portis and Rhonnel Y. Hearn, Response to Counter-Defendant’s Amended Motion to Strike Affirmative Defenses and to Dismiss Counterclaims,*

The same day he filed his response in state court, former Debtor filed with this Court an *Emergency Motion to Reopen Case to File Amended Schedules to Include Omitted Asset* (“Initial Motion to Reopen”).²² There, former Debtor described the “omitted asset” he wished to add in this case as a “potential cause of action related to the fraudulently obtained RCS mortgage [held by BONY].”²³ BONY filed an objection to the Initial Motion to Reopen alleging, *inter alia*, that the doctrine of judicial estoppel bars reopening this bankruptcy case because former Debtor never disclosed or pursued this alleged claim while this case was open, waited four years after his discharge to raise the claim, and may be deemed to have surrendered his interest in the property that secures BONY’s mortgage.²⁴

The Court held a preliminary hearing on the Initial Motion to Reopen on September 15, 2020.²⁵ At the conclusion of that hearing, the Court required the parties to submit additional briefing, including an

The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of CWMBS, Inc., CHL Mortgage Pass-Through Trust 2007-19, Mortgage Pass-Through Certificates Series 2007-19 v. Portis, No.: 01-2019-CA-3183 (Fla. 8th Cir. Ct. Sept. 2, 2020), Filing # 112818411.

²² Doc. 117.

²³ *Id.* ¶ 16. Former Debtor clarifies that this cause of action is contained within the “counter-claim against BONY based upon the fraudulent note and mortgage encumbering the Real Property.” *Id.* ¶ 15.

²⁴ *Objection to Debtor’s Emergency Motion to Reopen Case to File Amended Schedules to Include Omitted Asset*, Doc. 130.

²⁵ Doc. 135.

analysis of the impact, if any, of the Eleventh Circuit's ruling in *Slater v. U.S. Steel Corp.* ("*Slater II*") on the issues raised in the Initial Motion to Reopen and BONY's objection.²⁶

The day he was to file his additional brief, former Debtor filed the Amended Motion to Reopen seeking, among other things, to amend his bankruptcy Schedules to list the BONY mortgage as disputed, claim the real property as exempt homestead, and relinquish the "wildcard exemption" he has already received the benefit of.²⁷ BONY again objected, arguing that by the Amended Motion to Reopen, former Debtor was seeking to (1) improperly manipulate the bankruptcy system; (2) delay and cause confusion in the 2019 Foreclosure Action; and (3) assert defenses and causes of action against BONY that he is estopped from asserting by not listing them in his Schedules and Statement of Financial Affairs he filed with this Court.²⁸ After hearing additional argument of counsel the Court took the matter under advisement. The next day, former Debtor filed the Partial Withdrawal limiting the relief requested to

²⁶ *Slater v. U.S. Steel Corp. (Slater II)*, 871 F.3d 1174 (11th Cir. 2017).

²⁷ Doc. 137.

²⁸ Doc. 140. In his response to BONY's objection, former Debtor claims that he disclosed his defenses and claims as to the BONY mortgage to his former bankruptcy counsel, who failed to list them. Doc. 141.

reopening his bankruptcy case for the sole purpose of listing the BONY mortgage as disputed on Schedule D.

BONY objects to reopening this case, even for a limited purpose. According to BONY, it is too late for former Debtor to amend his Schedules, and Debtor's request to reopen this case is barred by judicial estoppel and the doctrine of laches.

DISCUSSION

I. The Limited Motion to Reopen should be granted.²⁹

The Bankruptcy Code allows a case to be reopened in the court in which such case was closed “to administer assets, to accord relief to the debtor, or for other cause.”³⁰ Whether to reopen a case is within the discretion of the Bankruptcy Court.³¹ Courts have generally looked at three factors when considering a motion to reopen: “(1) the benefit to the debtor; (2) the prejudice to the opposing party; and (3) the benefit to the creditors.”³² “The moving party has the burden to demonstrate sufficient cause to reopen.”³³ When a former debtor seeks to reopen a case to add a previously undisclosed asset, his “alleged bad faith is never a sufficient

²⁹ Henceforth the Court will refer to the Amended Motion to Reopen and Partial Withdrawal collectively as “Limited Motion to Reopen.”

³⁰ 11 U.S.C. § 350(b) (2020).

³¹ *In re Winburn*, 196 B.R. 894, 897 (Bankr. N.D. Fla. 1996); *In re Lopez*, 283 B.R. 22, 26 (9th Cir. B.A.P. 2002); *In re Velez*, 604 B.R. 438, 442 (Bankr. S.D.N.Y. 2019).

³² *In re Phelps*, 329 B.R. 904, 909 (Bankr. M.D. Ga. 2005).

³³ *In re Winburn*, 196 B.R. at 897.

basis by itself to deny a motion to reopen to schedule an asset that has the potential to benefit creditors.”³⁴ If reopening this case could provide a benefit to creditors, the case should be reopened.³⁵

The limited relief former Debtor now seeks is akin to adding a previously omitted asset. This relief could benefit former Debtor or creditors. By granting the Limited Motion to Reopen the Court will enable an independent Chapter 7 trustee (“Trustee”) to investigate, and potentially pursue, defenses to foreclosure of the BONY mortgage. If a Trustee were to successfully defend the property against BONY’s mortgage claim, the value of Debtor’s interest in the property would be preserved for creditors. If after investigation a Trustee were to decline to pursue defenses to the 2019 Foreclosure Action and abandon the property, former Debtor would retain his right to contest the 2019 Foreclosure Action in state court. He would thus retain the right to own the property free and clear of the BONY mortgage.

BONY will not be prejudiced if the case is reopened. BONY has been on notice since the 2014 Foreclosure Action that former Debtor disputes

³⁴ *In re Lopez*, 283 B.R. at 24.

³⁵ *Id.* at 28 (“Although we make no assumption about what actual value the Action might have, we note that it does not appear on its face to be valueless or unworthy of consideration by a chapter 7 trustee. . . . Neither the Action nor its possible value should be litigated in order to decide whether to reopen the bankruptcy case.”); *In re Upshur*, 317 B.R. 446, 451 (Bankr. N.D. Ga. 2004) (“The proper focus is on the benefit to the creditors, so that if the action has any value, the case should be reopened.”).

the validity of its mortgage and note. Former Debtor's legal position *vis a vis* the BONY note and mortgage comes as no surprise to BONY. No explanation is of record as to why BONY waited until 2019 to refile a foreclosure. But because it did so BONY's complaint that former Debtor waited two (2) years after his bankruptcy case was closed to seek to reopen the case is unpersuasive as a reason to deny reopening. Former Debtor had no reason to reopen this case until BONY sued him again in 2019. After he was served with the complaint in the 2019 Foreclosure Action former Debtor did not delay filing the Initial Motion to Reopen.

If the Court were to deny the Limited Motion to Reopen, BONY could reap a windfall at the expense of other creditors: it could defeat former Debtor's defenses of fraud and forgery on the basis of judicial estoppel, foreclose on the property, and eventually sell the property for a significant sum. Conversely, if the Court grants the Limited Motion to Reopen BONY loses only time. If a Trustee determines not to pursue Debtor's claims and defenses, BONY will be free to proceed with the 2019 Foreclosure Action and contest former Debtor's defenses there.

Benefit to creditors should prevail over former Debtor's and BONY's interests. "The '[f]undamental purpose of bankruptcy law is to place the property of the bankrupt, wherever found, under the control of the court,

for equal distribution among the creditors.”³⁶ BONY essentially argues that former Debtor is acting in bad faith; that he is attempting to game the bankruptcy system. Without question, such an ill intent was strongly suggested in the Amended Motion to Reopen. Had the Court granted that relief, former Debtor could have reaped a windfall. But the Limited Motion to Reopen no longer reflects bad faith or overreaching. Regardless, a debtor’s good or bad faith in failing to properly list an asset, or in this case a defense to a mortgage on a valuable asset, “is insufficient to preclude reopening if there is prima facie proof from which a chapter 7 trustee could reasonably determine that administering a previously undisclosed asset could benefit creditors.”³⁷

The value of former Debtor’s real property and its potential benefit to creditors warrants reopening the case and appointing a Trustee.

II. Reopening is not barred by the doctrine of laches.

Laches is an equitable doctrine typically raised as an affirmative defense.³⁸

³⁶ *In re Velez*, 604 B.R. at 442 (quoting *In re QC Piping Installations, Inc.*, 225 B.R. 553, 564 (Bankr. E.D.N.Y. 1998)).

³⁷ *In re Lopez*, 283 B.R. at 30.

³⁸ *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (“Laches is one of the affirmative defenses generally allowable under Fed. R. Civ. P. 8(c), although it is properly relevant only where the claims presented may be characterized as equitable, rather than legal.” (citing *Env’t Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir.), cert. denied, 449 U.S. 919 (1980))).

Laches “requires proof of three elements: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that the delay caused the defendant undue prejudice.” That test “is a flexible one: the court must examine both the amount of the delay and the prejudice caused by that delay.”³⁹

This Court has ruled that the doctrine of laches can bar a debtor from reopening a bankruptcy case.⁴⁰

The burden is on the objecting party, here BONY, to show that it suffered prejudice caused by former Debtor’s delay.⁴¹ To meet this burden, BONY must demonstrate at least that former Debtor knew of the asset before the case was closed, waited a substantial period of time after the case was closed to move to reopen, and has no valid reason for the original omission.⁴²

It is undisputed that former Debtor knew before he filed his case, and certainly before the case was closed, of the 2014 Foreclosure Action, his claims against BONY, and defenses to the BONY mortgage. Former Debtor clearly waited a substantial period to move to reopen. But BONY has failed to show lack of diligence by former Debtor that has prejudiced its rights.

³⁹ *Groucho Franchise Sys. LLC v. Gelco of GA, Inc.*, 683 F. App’x 826, 829 (11th Cir. 2017) (citations omitted).

⁴⁰ *In re Winburn*, 196 B.R. at 897.

⁴¹ *Id.* (citing *Costello v. United States*, 365 U.S. 265, 282 (1961)).

⁴² *Id.* (emphasis in original) (citations omitted).

BONY asserts former Debtor has no valid reason for failing to list the BONY mortgage as disputed or the 2014 Foreclosure Action in his bankruptcy papers. While it may be true, this assertion is, for now, contradicted by former Debtor's sworn testimony. In answers to Interrogatories, former Debtor declared that he informed his state court lawyer in the 2014 Foreclosure Action of the disputed mortgage and believed that lawyer informed his bankruptcy attorney.⁴³ Unquestionably, such testimony ignores the fact that all debtors are charged with reading and reviewing their bankruptcy schedules to ensure accuracy. Former Debtor gives no excuse for his apparent failure to do so. But for purposes of this ruling, although BONY questions the excuse that "my lawyers did it," no facts, as opposed to suppositions, are currently before the Court that would disprove this testimony.⁴⁴

III. A ruling on judicial estoppel is unnecessary to determine whether this case should be reopened.

At the preliminary hearing, BONY argued that the doctrine of judicial estoppel barred the reopening of this bankruptcy case. That

⁴³ Doc. 140-1, pp. 145–46. ("My prior litigation counsel, Mr. Elmore, was aware of the claims and counterclaims that I had against BONY and/or Residential Credit Solutions, Inc. . . . I provided Mr. Elmore with [my bankruptcy counsel's] contact information with the understanding that he would provide [that attorney] with the necessary information to include in the Schedules.").

⁴⁴ Both parties' rights to argue and present evidence on this point are preserved for the eventuality that the issue of judicial estoppel becomes ripe. *See Slater II*, 871 F.3d at 1177.

argument prompted the Court to request further briefing, with a focus on the Eleventh Circuit's ruling in *Slater II*.⁴⁵ Thereafter, former Debtor filed the Limited Motion to Reopen.

Slater II did not involve reopening a bankruptcy case. The issue in *Slater II* was limited to judicial estoppel: "what suffices for a district court to find that a plaintiff who did not disclose a civil lawsuit in bankruptcy filings intended to make a mockery of the judicial system?"⁴⁶

It is unnecessary to consider judicial estoppel and *Slater II* at this juncture. Once this case is reopened, BONY may raise judicial estoppel in defense of former Debtor's claims that the note and mortgage are invalid, here or under cover of the 2019 Foreclosure Action.

CONCLUSION

The interests of creditors will best be served by reopening this case and permitting a Trustee to investigate and possibly pursue former Debtor's claims and defenses related to the BONY mortgage.

For the reasons stated, it is ORDERED:

1. *Debtor's Amended Motion to Reopen Case to file Amended Schedules to Include Omitted Asset* (Doc. 137), as modified by the

⁴⁵ Doc. 135.

⁴⁶ *Slater II*, 871 F.3d at 1177.

Notice of Partial Withdrawal Regarding Debtor's Amended Motion to Reopen Case to File Amended Schedules to Include Omitted Asset (Doc. 143), is GRANTED.

2. This case is reopened to allow Debtor to file an amended Schedule D to list BONY's mortgage claim as "disputed" and to file an amended Statement of Financial Affairs to disclose the 2014 Foreclosure Action. Former Debtor has fourteen (14) days from the date of this Order within which to do so.
3. The United States Trustee is directed to appoint a Chapter 7 trustee to take whatever action may be necessary or appropriate.
4. All claims and defenses of former Debtor and BONY, including judicial estoppel and laches, are fully preserved.
5. The Court retains jurisdiction over the parties and any additional matters raised in the reopened case.

DONE and ORDERED on January 14, 2021.



Karen K. Specie
Chief U. S. Bankruptcy Judge

Debtor's attorney is directed to serve a copy of this Order on all interested parties within three (3) days of entry of the Order and file proof of such service.